SEARCHING FOR THE PERSON TO BE SEIZED

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I. INTRODUCTION

Nothing in the language of the fourth amendment supports a distinction between searches for property and searches for persons,[1] yet the development of the law has diverged in establishing requirements for these two types of searches.[2] Police authority to conduct searches for property

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[1] U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] Trupiano v. United States, 334 U.S. 699 (1948) demonstrates the difference. Federal agents staged a warrantless nighttime entry onto premises for a dual purpose—to search for and seize a person and to search for and seize property. Despite ample opportunity to do so, the agents had obtained neither search nor arrest warrants. After *entry* was made, however, police had witnessed the commission of a felony and thus the arrest was valid. Rather than focusing on the basic intrusion (the entry) and the "difficult inquiry . . . when it is that the police can enter upon a person's property to seize his person . . . papers and effects without prior judicial approval." Coolidge v. New Hampshire, 403 U.S. 443, 475 (1971), the Court upheld the legality of the person seizure, but took an extremely restrictive view of the seizure of property, "the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest." Trupiano v. United States, *supra* at 708. The determining factors for the court in denouncing the property seizure—advance police knowledge of the existence and location of the evidence, police intention to seize it, and the ample opportunity for obtaining a warrant—were equally applicable to the person seizure. Although Trupiano's extremely restrictive view of searches "incident" to arrest has not been "reinstated" by the Court the case retains its vitality with regard to the different standards which are applied to entries to search for persons and entries to search for things. The distinction rests in a construction of the fourth amendment in light of its common law background. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUPREME COURT REVIEW 46, 49-50, citing, *inter alia*, 1 CHITTY, CRIMINAL LAW 15-26, 33, 51-59 (1816). Search warrants were required unless there were exceptional circumstances. "All felony arrests, including those involving entry into houses, could be made without securing warrants. In fact, warrants were regarded with suspicion and their use recognized only reluctantly and for the primary purpose of protecting persons making arrests from tort liability." Barrett, *supra* at 49-50.

Illustrative also of the dual approach to person searches and property searches is the Ninth Circuit's decision in United States v. Alameida-Sanchez, 452 F.2d 459 (9th Cir. 1972), *rev'd*, 93 S.Ct. 2535 (1973). Recognizing that the automobile search in question did not fall within the exception to the probable cause requirement applicable to "border searches" of persons and vehicles, the court nevertheless upheld a conviction for transportation of illegally imported marijuana discovered during an immigration search for concealed aliens. Immigration officers had conducted the search under statutory authority, 8 U.S.C. § 1357 (1910), had stopped the car at random, and had no grounds, reasonable or otherwise to do so. The majority construed the statute as allowing such a search without a warrant and without cause. The dissenting opinion of Judge Browning indicated that since this search was not within the border search exception it violated the fourth amendment:

> There is no apparent reason why these Fourth Amendment principles do not apply with the same force to searches of automobiles for smuggled aliens as they do to

is constrained by the general rule that searches without a search warrant are per se unreasonable unless they fall within certain specific exceptions.[3] In effect a judicial determination of both the need for the proposed seizure and the probable cause to believe the object sought is within the place to be searched is necessary prior to any invasion of an individual's privacy. If the object of the search is a person, on the other hand, the rule seems to be that all that is necessary is an arrest warrant[4] and, indeed, in some jurisdictions, given grounds for an arrest without a warrant, even that will not be required.[5] The crucial distinction is that the arrest warrant, unlike the search warrant, does not require any prior judicial finding of the need for the police to search or of the probability that the search will be fruitful. This distinction between searches for persons and searches for property is embodied in federal and state procedural rules on warrants and searches. Generally, arrest warrants require designation or description of the person to be arrested with no reference to the places that may be searched in effecting the arrest.[6] Search warrants,

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searches of automobiles for smuggled merchandise. Yet this court has drawn a sharp distinction between the two. . . . If a reason exists for distinguishing searches for aliens from searches for merchandise, no one—including this court—has yet suggested what it might be.

United States v. Alameida-Sanchez, *supra* at 463-64.

[3] Katz v. United States, 389 U.S. 347, 357 (1967). The exceptions include: a) search incident to and following a lawful arrest, Chimel v. Calif., 395 U.S. 752 (1969); b) search of vehicles with probable cause, Carroll v. United States, 267 U.S. 132 (1925); c) consent searches, Johnson v. United States, 333 U.S. 10 (1948); Bumper v. North Carolina, 391 U.S. 543 (1968); d) search with probable cause for and in hot pursuit of fleeing and dangerous felony suspect, Warden v. Hayden, 387 U.S. 294 (1967); e) search of abandoned real estate or personal property, Abel v. United States, 362 U.S. 217 (1960); f) search under urgent necessity, United States v. Barone, 330 F.2d 543 (2d Cir. 1964), *cert. denied* 377 U.S. 1004 (1964); g) search pursuant to custodial prerogative, Cooper v. Calif., 386 U.S. 58 (1967); h) search with probable cause, necessary to prevent loss or destruction of the thing to be seized, United States v. Barone, *supra*; Johnson v. United States, *supra*.

[4] "While there is no strict logic in the matter it seems to be accepted, at least by implication, that the obtaining of an arrest warrant is material in supporting a search of premises as not 'unreasonable' even though the magistrate has not passed upon the need for invasion of privacy of the premises." Dorman v. United States, 435 F.2d 385, 396 n.25 (D.C. Cir. 1970) (Wright J., dissenting).

[5] *See* the discussion and the citation of early cases in Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 558, 798, 800-03 (1924). *See also* Annot., 5 A.L.R. 263 (1920); Annot., 76 A.L.R.2d 1432 (1961). Tort law is consistent. RESTATEMENT (SECOND) OF TORTS §§ 204 and 206 (1965).

[6] FED. R. CRIM. P. 4(b)(1) provides that the warrant "shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint . . . ." Nothing in Rule 4 refers to place.

Statutory law supports the position of the procedural rules. For example, federal law on searches without a search warrant states that

whoever, being an officer, agent or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States searches any private dwelling used and occupied as such dwelling without a warrant directing such search . . . shall be fined . . . or imprisoned . . . . This sec-

on the other hand, require a specific description of the place to be searched as well as the property sought with no reference to persons sought.[7] This means that if the object of the search is a person, neither arrest nor search warrant rules fit. There is thus no established procedure that complies with the constitutional mandate that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, *and* the persons . . . to be seized."[8]

Most states make no provision for obtaining a warrant to search for persons;[9] and although the drafters of the recent ALI draft on search and seizure included persons among the objects of a search when warrants are sought,[10] they did so without conviction. Since neither the search and seizure nor the arrest draft provisions require a search warrant for a person, the drafters view the inclusion as unnecessary but harmless.[11]

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tion shall not apply to any person a) serving a warrant of arrest; or b) arresting or attempting to arrest a person . . . ,

18 U.S.C. § 2236 (1970), thereby affording a grant of authority to seek out the person to be arrested without a search warrant.

18 U.S.C. § 3109 (1970) provides, "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance. . . ." This same standard applies to entries for execution of arrest warrants, Miller v. United States, 357 U.S. 301 (1958), and execution of warrantless arrests. Sabbath v. United States, 391 U.S. 585 (1968). The distinction remains, however, that with a search warrant, the need for entry and search has been passed upon by a neutral magistrate, whereas under arrest authority the need to enter and search is determined by the officer.

[7] FED. R. CRIM. P. 41(b) and (c) provide: "A warrant may be issued under this rule to search for and seize any property. . . . [The judge or commissioner] shall issue a warrant identifying the property and naming or describing the person or place to be searched. . . ." Although Rule 41 covers the search *of* a person, it does not cover the place to be searched *for* a person; the Rule also does not provide for either identifying or seizing a person.

[8] U.S. CONST. amend. IV (emphasis added).

[9] Delaware and Vermont are exceptions. DEL. CODE ANN. tit. 11, § 2305 (Supp. 1970): "*Objects of search warrant.* A warrant may authorize the search of any house or place for . . . (6) Persons for whom a warrant of arrest has been issued." § 2307 (Supp. 1970); "*Issuance of Search Warrant; contents.* The warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things or persons sought as particularly as possible . . . ." VT. STAT. ANN. tit. 13, § 4701 (Supp. 1970): "Issuance of search warrants. (2) To search for and seize a person against whom a warrant for a criminal offense has been issued when such person is believed to be secreted . . . ." § 4702 (Supp. 1970): "*Affidavit.* A search warrant shall not be granted except [when an affiant] has reason to suspect and does suspect that a person against whom a warrant for a criminal offense has been issued is secreted in the house or place to be searched . . . ."

[10] ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 220.1(3) (Proposed Official Draft No. 1, 1972):

> *Contents of Application.* The application shall describe with particularity the individuals or places to be searched and the individuals or things to be seized, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that such individuals or things are in the places . . . to be searched.

[11] In the commentary to the ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, the view that a search warrant is required for almost any kind of entry into premises including entry to arrest, is rejected as "lack[ing] substantial support in the accepted law relating

Moreover, although the Supreme Court has spoken often concerning searches for articles,[12] there has been a lack of critical discussion by the Court, as well as by other courts and scholars, dealing with the scope of police authority to conduct a search for persons as a prerequisite to lawful arrest.[13] So silent have been the law and the commentators that some observers of police practices may not even be aware of the problem.[14]

This article explores the differences between fourth amendment strictures and current operational requirements for person searches, focusing on police authority to make, with or without an arrest warrant, entries and subsequent searches to effect an otherwise valid arrest. The article also examines the existing dichotomy between searches for property and persons and scrutinizes the rationale offered in support of the distinction. It is concluded that there is no satisfactory justification for the difference and that, therefore, the fourth amendment requires that the legal standards and procedural practice developed for searches for objects be applied to searches for persons.

As previously indicated, the relevant cases are few and their discussions often ignore or focus only tangentially on the issue under consid-

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to arrest, and is unsufficiently supported by considerations of policy. However, there does not appear to be any objection to granting explicit statutory authority for such searches . . . ." *Id.* at 170. Thus, a search warrant *may* be used where the object sought is a person subject to arrest or "unlawfully held in confinement or other restraint." § 210.3(1)(d). Section 120.6, *Place of Arrest: Private Premises*, makes no provision for designation in an arrest warrant of the place to be entered although a restriction is included on time of arrest. § 120.6(3). Police authority to make entry onto private premises under authority of arrest is clearly spelled out in §§ 120.6(1) and (2). The requirements are that the officer have reasonable cause to believe that a person whom he is authorized to arrest is present on any private premises. Entry may be made upon demand after the officer has identified himself or without demand, under exigent circumstances.

[12] *See* the discussion and the cases cited in Coolidge v. New Hampshire, 403 U.S. 443, 449-84 (1971).

[13] The statement in Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970), that "there is little if any analysis focusing on entry into a dwelling for the purpose of an arrest" is equally applicable to analysis focusing on subsequent searches of dwellings for persons to be arrested. Critical analysis most likely has been foreclosed by general acceptance of the rule that a police officer may make a peaceable or forcible entry to search any premises without a search warrant for the purpose of arresting one accused of a felony. 5 AM. JUR. 2d *Arrest* §§ 89-93 (1962). In addition, there has been an analytic failure to distinguish between the entry stage and the search stage of the arrest procedure. *See* discussion accompanying notes 66-68, *infra*.

See LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire"*, 8 CRIM. L. BULL. 9, 14, 20 (1972).

[14] In the second edition of HALL AND KAMISAR, MODERN CRIMINAL PROCEDURE (2d ed. 1966), there was no express category or subsection directed to the subject of person searches. Some case fact situations, however, presented the issue although the court opinions did not analyze it. *See, e.g.*, State v. Chinn, 231 Or. 259, 373 P.2d 392 (1962), cited in HALL AND KAMISAR, *supra* at 113. The third edition gives full recognition to the problem. HALL, KAMISAR, LAFAVE, AND ISRAEL, MODERN CRIMINAL PROCEDURE 267-68 (3d ed. 1969) and SUPPLEMENT 71-73 (1973).

eration. Nevertheless, succeeding sections analyze several of these cases because they (1) reveal the factual variations of person searches; (2) suggest the blunt outlines of traditional law; (3) identify the kinds of proposals being considered for clarifying or changing the law; and (4) indicate the degree of judicial receptivity to the notion that something needs to be done.

II. SEARCHES WITHOUT AN ARREST WARRANT

Federal law enforcement officers may make warrantless arrests upon probable cause.[15] Indeed Congress has explicitly authorized United States marshalls,[16] secret service,[17] narcotics and dangerous drug officers,[18] and agents of the Federal Bureau of Investigation (FBI)[19] to make warrantless arrests even when there is time to get a warrant without fear that the suspect may flee. The issue under consideration in this paper, however, is not the question of authority to make warrantless arrests but rather authority to make entries and subsequent searches to effect an arrest absent a search warrant. Unfortunately most of the cases involving warrantless arrests do not confront this issue directly. Rather the question of the legality of a warrantless police intrusion is more often presented in the context of motions to suppress physical evidence seized during such intrusions. Nevertheless, examination of the case law in point does provide a starting point for analysis.

In assessing the legality of a warrantless police entry and search under arrest authority the Supreme Court has focused primarily on the real purpose of the search. Thus, in *Jones v. United States*,[20] the Court rejected a government argument that federal agents without a search or an arrest warrant entered a dwelling for the purpose of arrest. The Court, instead, found that the search by officers whose daytime search warrant had expired was based on their probable cause to believe that the dwelling contained contraband. Since the Court found that the officers' real purpose was to search for distillery equipment and not to arrest Jones, the warrantless search was untenable. However, the Court did not reach

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[15] The constitutional standard for making a warrantless arrest is reflected in federal statutes which require that officers have reasonable grounds to believe that the person to be arrested has committed or is committing a felony. Henry v. United States, 361 U.S. 98, 100 (1959).

[16] 18 U.S.C. § 3053 (1970).

[17] 18 U.S.C. § 3056 (1970).

[18] 21 U.S.C. § 878 (1970).

[19] 18 U.S.C. § 3052 (1970). Customs officers, INT. REV. CODE OF 1954, § 7607, and postal personnel, 18 U.S.C. § 3061 (1970) have similar authority.

[20] 357 U.S. 493 (1958).

the question whether even an arrest warrant would have been mandatory under similar circumstances where the object of the search was an arrest. Thus *Jones* left unresolved a "grave constitutional question, namely whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within upon probable cause that he committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment."[21]

Other courts have approached the problem similarly.[22] The purpose of the search in *United States v. Verdugo*[23] was a pivotal factor in the successful challenge made to a detailed search of a private residence conducted subsequent to an arrest. In *Verdugo*, the agents of the Bureau of Narcotics and a San Francisco police inspector arrived at defendant's residence, ostensibly seeking Verdugo. The defendant's wife stated that her husband was not at home, whereupon the officers gained entrance after a "show of authority,"[24] walked around, looked into rooms to determine if Verdugo was present, and stationed themselves in the home to await his return. When Verdugo returned, he ordered the officers out of his home but was immediately placed under arrest and restrained. The officers then undertook a second, more extensive and detailed search of the premises. Although the government contended that the agents went

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[21] *Id.* at 499-500. The issue was once again acknowledged by five members of the Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971):

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

Justice White added,

> [A]rrest and search of the person on probable cause but without a warrant is the prevailing constitutional and legislative rule, without regard to whether on the particular facts there was opportunity to secure a warrant. Apparently, exigent circumstances are so often present in arrest situations that it has been deemed improvident to litigate the issue in every case.

Id. at 523-24.

In Johnson v. Louisiana, 406 U.S. 356 (1972), appellant had urged that his nighttime arrest in his home without a warrant was unlawful in the absence of a valid excuse for failing to obtain a warrant. Again, the question was not reached by the Court since the conviction did not rest on evidence found in Johnson's home.

[22] In the recent case of United States v. Artieri, 14 CRIM. L. REP. 2410 (2d Cir. Jan. 23, 1974), the district court suppressed evidence because it found that a warrantless entry was for the purpose of searching for drugs. The Second Circuit reversed finding that the purpose of entry was arrest.

[23] 240 F. Supp. 497 (N.D. Cal. 1965).

[24] *Id.* at 499. Although a commissioner's arrest warrant for Verdugo had been issued in September, 1964 for a July, 1964 narcotics law violation, the court stated that it was conceded that the government agents and police officers were not armed with an arrest warrant during the search and arrest which took place in October, 1964. *Id.* at 498. The court seems to view the case as if it were a non-arrest warrant one; thus, we view it that way.

to defendant's residence for the purpose of arrest, the court stated "the plain import of the testimony was that they were to look for the contraband and to make an arrest in order to get same."[25] Because the purpose of the search was to find property, the court held the search to be unreasonable. The *Verdugo* court, like the *Jones* court, did not directly consider the question of the validity of the entry and initial search apparently made pursuant to achieving the arrest.

Since neither *Jones* nor *Verdugo* confront the precise question of the validity of a warrantless entry and search based upon a reasonable belief that an individual whom the police have probable cause to believe has committed a felony is inside, only tentative conclusions can be drawn from the opinions. Two factors, however, support the conclusion that a bona fide purpose of arrest would have sterilized, at least in part, these police searches. First, the fact that both courts narrowed the focus of their inquiry to the *purpose* of the search implies that there are different standards required of searches for objects than are necessary for valid searches for persons. Second, the Supreme Court in *Jones* framed "the grave constitutional question" in terms of an intrusion made under circumstances where an *arrest* warrant could have been sought. In other words, the Court, at least in dicta, seems to assume that a *search* warrant is unnecessary when the object of a search is a person.

In fact, the Tenth Circuit, in *Michael v. United States*,[26] upheld a warrantless, unconsented 5:30 A.M. intrusion and search of a private residence by three FBI agents, two sheriffs, and two deputies in which a bona fide purpose of arrest was established. The court found that the federal agent who six months earlier had been officially notified and authorized to locate and apprehend the deserter, and who had been informed shortly before the date of the search that the deserter was in the Michael home, had authority to arrest Michael either with or without a warrant of arrest. Moreover, the court, relying by negative implication on Federal Rule 41, indicated that a purpose to arrest is clearly sufficient to justify an entry into a private residence when there is good reason to believe the individual sought would be found:

> This court, therefore, considers that, quite irrespective of the ultimate determination of James Warren Michael's guilt of desertion or Joyce Marie Michael's guilt of harboring her husband, as a deserter, the arrest of each of them, and the entry by the arresting officers into their place of abode, was lawful. That is true despite the absence of a warrant of arrest in respect of either of them. And, so far as concerns the absence of a search warrant, the appellee correctly contends that there was, in the

[25] *Id.* at 498.

[26] 393 F.2d 22 (10th Cir. 1968).

> circumstances of the event, no occasion for the procurement or possession by Agent Radford of a warrant of that character. He came to arrest a man—and, contingently, also a woman, and possibly another man —not to locate, identify or seize any property.[27]

It is interesting to note that the appellant in this case was Mrs. Michael who had been convicted of willfully harboring her deserter-husband. Had the focus of the search of her home been property rather than a person, objections to the reasonableness of the warrantless, unconsented intrusion would doubtless have elicited a different judicial response.[28]

In contrast with the above opinions, which apparently assume that no warrant of any kind is necessary for an entry and search for an individual who is to be arrested, are cases reflecting a somewhat greater concern for traditional fourth amendment standards. In *Morrison v. United States*,[29] the Court of Appeals for the District of Columbia Circuit held a warrantless police entry, made two hours after an alleged perverted act, and a subsequent search of a private dwelling in an effort to arrest the suspect, to be illegal in the absence of any urgency, even though the police had probable cause to believe a felony had been committed. Although *Morrison* has been cited to support the argument that a search warrant is required to search a premises for a suspect,[30] a careful reading of the case does not support this conclusion. In the first place the legality of the search was tested by a motion to suppress physical evidence, suggesting that the court's consideration of the legality of the search per se was directed toward the search for the property and not the search

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[27] *Id.* at 33.

[28] In these circumstances the potential protections afforded by the Vermont and Delaware statutes and the Proposed ALI Rules which include persons within the scope of search warrants are greater than the ALI Commentary suggests. *See* notes 9-11, *supra*, and accompanying text. Inclusion of persons to be arrested within the scope of search warrants is, however, meaningless unless judicially recognized and supported as constitutionally required.

[29] 262 F.2d 449 (D.C. Cir. 1958). *See also* Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

[30] *See* Wheeler v. Goodman, 330 F. Supp. 1356, 1362 (W.D. N.C. 1971); Lankford v. Gelston, 364 F.2d 197, 206 (4th Cir. 1966) (appellant's argument). Other cases relied upon for the proposition that a search warrant is required when searching premises for a person are District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949) and Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

Morrison, Accarino, and *Little* are opinions by Judge Prettyman. The dicta of these cases unquestionably are forceful support for requiring a search warrant when entry to premises is made: "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate." Accarino, *supra* at 464; and Little, *supra* at 17.

However, *Accarino* and *Morrison* were arrest cases in which the police had neither arrest nor search warrants; *Little* was a health code inspection case.

for the suspect. Furthermore, the fact that police had neither an arrest nor a search warrant and the court's statement that "police officers cannot, without a warrant of any kind, walk into an unoccupied, unlocked private home and search it, either for property or a person,"[31] imply, it would seem, that an arrest warrant alone would have validated the entry and subsequent search in the absence of urgency or necessitous haste.

In *Warden v. Hayden*,[32] the Supreme Court, again considering the admissibility of physical evidence, upheld both the entry and the subsequent search for a robber without a warrant because "the exigencies of the situation made that course imperative."[33] The Court found that the police, informed that the suspect of an armed robbery had entered a dwelling minutes before their arrival, had acted properly when they entered and began to search for the suspect. But, if it is exigent circumstances such as "hot pursuit" which support the search warrant exception in this situation, then can it be inferred that the search of a premises for a person to be arrested in the absence of exigent circumstances requires a search warrant? In light of the fact that the police in *Warden v. Hayden* did not have an arrest warrant, it is a more likely inference—if any inference at all can be drawn[34]—that what is required, and what is consistent with *Morrison*, is not a search warrant but an arrest warrant.[35]

Finally, in *Dorman v. United States*,[36] police, with positive identification of a robbery suspect, with evidence of his address, and with knowledge that he was armed, made a warrantless, unconsented, non-forcible late evening entry into his apartment a few hours after the offense. The court, echoing *Jones v. United States*,[37] acknowledged the "grave constitutional issue" raised by an unconsented nighttime entry into a private residence to arrest a suspected felon when no reason appears why an

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[31] 262 F.2d 449, 453 (D.C. Cir. 1958).

[32] 387 U.S. 294 (1967).

[33] *Id.* at 298, quoting from McDonald v. United States, 335 U.S. 451, 456 (1948). *See also* White v. Brough, 332 F. Supp. 438 (D. Md. 1971).

[34] Because of the presence of exigent circumstances, the Court may have simply not considered alternative bases for validating the entry. Thus no implication was intended and no inference should be drawn. Justice White commenting on the majority's suggestion in Coolidge v. New Hampshire, 403 U.S. 443 (1971) "that warrantless, probable-cause arrests may not be made in the home absent exigent circumstances," *Id.* at 512 n.1, pointed out that the Court had never intimated or held as a constitutional matter a requirement of exigent circumstances "other than the necessity for arresting a felon . . . ." *Id.*

[35] Justice Stewart in Coolidge v. New Hampshire, 403 U.S. 443 (1971) observed, "The case of *Warden v. Hayden* . . . certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." *Id.* at 480-81.

[36] 435 F.2d 385 (D.C. Cir. 1970).

[37] 357 U.S. 493, 499-500 (1958).

arrest warrant could not have been procured. But the court held the entry and search for Dorman was not violative of his constitutional rights, since the case "presented the kind of exigent circumstances and urgent need that justified an entry . . . without the delay incident to the warrant."[38] *Dorman* was decided by the Court of Appeals for the District of Columbia Circuit, the same court that had earlier decided *Morrison*. In dicta, the *Dorman* court cited the *Morrison* opinion approvingly and went to some length to equate the standards for search for persons and property. Nevertheless, the result reached by the court, the references to *Morrison*, and the court's continued references to the need for "a warrant" all would seem to indicate that *Dorman* ultimately does not change the need for police to secure search warrants when the object of the search is a person.

The thrust of these latter cases does appear, however, to limit the broad grant of authority to enter and search a premises as prerequisite to arrest when neither an arrest nor a search warrant has been obtained, to situations which fall within the recognized warrant exception of urgent need or exigent circumstances.

III. SEARCHES WITH AN ARREST WARRANT

As the discussion above implies, police authority under an arrest warrant to search private property for a person is firmly established in the case law;[39] however, the extent of that authority may depend upon whether the search involves the suspect's premises or a third party's premises. The validity of a search for a person on that person's own property under authority of an arrest warrant appears unquestioned. As early as 1931 the Fourth Circuit, in *Paper v. United States*,[40] assumed that a bench warrant was the fourth amendment equivalent of a search warrant. In that case officers in searching for a person on his premises in order to arrest him discovered physical evidence of a crime other than that for

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[38] Dorman v. United States, 435 F.2d 385, 393 (D.C. Cir. 1970). The *Dorman* court identified relevant considerations in applying the exigent circumstances test:

> 1) a grave offense is involved, particularly a crime of violence; 2) the suspect is reasonably believed to be armed; 3) a "clear showing" is made of probable cause to believe that the suspect committed the crime involved; 4) strong reason exists to believe that the suspect is on the premises; 5) there is likelihood that the suspect will escape if not quickly apprehended; 6) the entry is peaceable; 7) and a factor which cuts two ways: the entry is made at night.

Id. at 392-93. *See also* Vance v. North Carolina, 432 F.2d 984, 990 (4th Cir. 1970) and United States v. Shye, 13 CRIM. L. REP. 2428 (M.D. Tenn. Sept. 9, 1973) which review and apply the *Dorman* standards of exigency; and United States v. Honesty, 459 F.2d 1279 (D.C. Cir. 1971).

[39] *See* authorities cited note 5, *supra*.

[40] 53 F.2d 184 (4th Cir. 1931).

which they were seeking arrest. The court noted that searches which violated the Constitution involved either an element of trespass or a fraudulent invasion. There was clearly no fraud on the facts of the case, since the officers did have a bona fide arrest purpose. Moreover the court found, without discussion, that the evidence had been seized not by trespass but during a lawful search, since the "officers had the right to go upon the defendant's premises for the purpose of finding and arresting him."[41]

The Third Circuit in *United States v. Joines*,[42] affirmed the proposition that, by virtue of the warrant of arrest, officers have a lawful right to search the premises of the suspect, and to break open outer or inner doors if necessary. Defendant had sought to suppress evidence which had been discovered by Internal Revenue Service agents in the course of searching an empty home for him in order to execute an arrest warrant. The agents had broken an outside cellar door and had come upon and seized a still, mash and liquor. The court, in a per curiam opinion, found that the evidence had been discovered and seized in the course of a lawful search for the defendant.

One review,[43] the Supreme Court vacated judgment and remanded the case for consideration in light of *Jones v. United States*,[44] decided that same day. The conviction was reaffirmed on remand[45] and the legality of the search and seizure was upheld since "officers [armed with a warrant of arrest] searched the defendant's dwelling house in a bona fide attempt to find and arrest him and . . . they did not know of, or even suspect, the existence of the still, mash and liquor in the dwelling house until they came upon it in the course of their search for the defendant."[46] The court distinguished *Jones* on the grounds that the officers in *Joines* not only had an arrest warrant but also had no probable cause to believe the articles subject to seizure were in the dwelling.

The breadth of police authority under an arrest warrant is further exemplified by the Fourth Circuit opinion in the case of *United States v. Retolaza*.[47] In that case agents in possession of a warrant for defendant's arrest were admitted to his apartment by his wife to verify their knowledge that defendant was *not* present. According to the court, "The only search made by the agents was for the person of the defendant.

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41 *Id.* at 185.

42 246 F.2d 278 (3d Cir. 1957).

43 357 U.S. 573 (1958).

44 357 U.S. 493 (1958).

45 258 F.2d 471 (3d Cir. 1958), *cert. denied*, 358 U.S. 880 (1958).

46 *Id.* at 472.

47 398 F.2d 235 (4th Cir. 1968).

It was conducted under the authority of the arrest warrant. . . ."[48] In upholding the entry to the premises and the legality of evidence seized by the offices, the court stated:

> We have no quarrel with the proposition that . . . police may not take advantage of entry to a house under warrant of arrest . . . to conduct a search of the type which the Fourth Amendment requires be conducted under search warrant, issued upon a showing of probable cause. This case is simply not one of that class. The agents of the FBI who had a warrant for defendant's arrest, were fully justified in requesting Mrs. Retolaza [who had accompanied them to the premises] to give them entrance to her apartment to verify the non-presence of the defendant, notwithstanding that their own investigation from the outside indicated that there was no one within.[49]

Thus these cases not only allow the police to enter and search the residence of the person named in an arrest warrant; they allow the intrusion when the police officers do not have probable cause to believe the suspect is at home at the time, and, as *Retolaza* suggests, even when the police have reason to think that the suspect is not at home.

When compared with searches of the suspect's own premises the prevailing requirement for suspect searches of a third party's premises under authority of an arrest warrant is more stringent since it appears that police must have probable cause to believe the suspect is in fact on the premises.[50] The distinctiveness of searches for persons on the premises of third parties was brought sharply into focus in *Lankford v. Gelston*,[51] a case in which police officers, with arrest warrants for two persons suspected of committing armed robbery and wounding a police lieutenant, conducted over 300 searches during a nineteen day period, most of which were searches of private residences. In an action seeking injunctive relief to prevent the city police commissioner and police officers from continuing or resuming such searches,[52] the Fourth Circuit issued a decree which enjoined the police from conducting a search of private residences, whether with or without an arrest warrant, for the purpose of arresting any person not known to reside there, in the absence of probable cause

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[48] *Id.* at 238.

[49] *Id.*

[50] *See* note 5, *supra*; *see also* United States v. Brown, 467 F.2d 419 (D.C. Cir. 1972). *But see*, Love v. United States, 170 F.2d 32 (4th Cir. 1948), *cert. denied*, 336 U.S. 912 (1949); United States v. Alexander, 346 F.2d 561 (6th Cir. 1965), *cert. denied*, 382 U.S. 993 (1966).

[51] 364 F.2d 197 (4th Cir. 1966).

[52] Not only the intensity but the character of the search was in question; as the court said, "The undisputed testimony indicates that the police in conducting the wholesale . . . raids were engaging in a practice which on a smaller scale has routinely attended efforts to apprehend persons accused of serious crime." *Id.* at 201.

to believe the person was on the premises. The court, however, refused to grant the broader injunction which had been sought prohibiting such searches in the absence of exigent circumstances unless police had obtained a search warrant and, hence, prior judicial determination of probable cause to search for the person on the premises of a stranger, saying, "We have no occasion now to accept or reject the legal theory thus advanced . . . or to canvass countervailing arguments."[53]

The same legal theory—that in the absence of exceptional circumstances, and even with probable cause to believe the suspect is within, a search warrant is required before entering and searching a third party's premises to execute a valid arrest warrant—was explicitly raised in *United States v. McKinney*[54] and rejected. The court concurred with appellant's statement that the fourth amendment applies "whether the government is searching for objects or for a person for whom an arrest warrant has been issued,"[55] but added that "even if we were to accept appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant."[56] *McKinney* stands for the proposition that a magistrate's determination of probable cause to arrest and the inherent mobility of the person combine to justify a search without a search warrant of a third party's premises if authorities reasonably believe the suspect can be found within.

A different view, however, was espoused in *Wheeler v. Goodman*:[57] "Two factors often advanced to justify a search without a search warrant are 1) the existence of an *arrest* warrant, and 2) tips from 'reliable informants.' It does not appear that . . . either of these factors justifies a search without a search warrant unless the search comes within one of the otherwise recognized exceptions."[58] In *Wheeler*, findings were made in six cases for the purpose of granting or denying injunctive relief against police conduct. The findings in one of them, *Harris v. Goodman*,[59] are instructive. The search in *Harris* was made of the home of the suspect's cousin, Walter Booker, by police with an arrest warrant for Larry Miller, a robbery and murder suspect. The search in question was based on reliable and confidential information given to police

[53] *Id.* at 206.
[54] 379 F.2d 259 (6th Cir. 1967).
[55] *Id.* at 263.
[56] *Id.*
[57] 330 F. Supp. 1356 (W.D. N.C. 1971).
[58] *Id.* at 1362.
[59] *Id.* at 1368-69.

through FBI agents that the suspect was in the apartment, that he was armed, and that he had said he would never be captured alive. During the search a search warrant was requested by Mrs. Booker but none was displayed. Miller was not found in the apartment. The court found that the "legality of the daytime search of the Booker home is a close question, but the court is of the opinion that there was probable cause to make the search and that the search did satisfy the *Warden v. Hayden* . . . exception to the warrant requirement, as that exception is defined in *Dorman v. United States*[60] . . . and that the search was therefore not unreasonable."[61]

Thus the *Wheeler* court, in assessing the reasonableness of searches for persons conducted with arrest warrants but without search warrants, seems to indicate that something more than probable cause to believe the suspect is on the premises is required, and that what is required is adherence to the basic rule that searches conducted without prior judicial approval are per se unreasonable under the fourth amendment—subject only to a few exceptions, such as a search conducted by police while they are in hot pursuit of a fleeing and dangerous felony suspect.

With the exception of a rare opinion like *Wheeler*,[62] the cases attribute much too comprehensive a grant of authority to an arrest warrant. The language of the fourth amendment contemplates a prior judicial determination of the probable cause for the seizure of persons and the probable cause that such persons are in fact located in the premises to be searched. When the suspect's premises are to be searched, the warrant, as we have seen, validates the search although neither judge nor police officer has weighed the evidence supporting probable cause to believe the suspect is on his premises. There is no reason to conclude that he invariably will be there—that any inquiry is superfluous. In some instances, for example when the suspect is aware that he is wanted by the police, the last place he might be found is at his home; in other instances, he may reside at home but it may be unknown during what

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[60] See note 37, *supra.*

[61] Harris v. Goodman, 330 F. Supp. 1356, 1369 (W.D. N.C. 1971).

[62] Another court has found that "to grant officers the right to search a private residence without a warrant under the guise of searching for one 'AWOL' from the armed forces would open the avenue to subterfuge, deception, and artifice." England v. State, 488 P. 2d 1347, 1349 (Okl. Cr. 1971). In this case six officers, searching for a person for whom a U.S. Marine Corps arrest warrant had been issued arrived at a third party's residence. The officers had gone to the same address the week before. While proceeding to the back door two officers detected the odor of marijuana; they then looked in the windows and saw the defendant smoking a rolled cigarette. They entered the premises and arrested the defendant. On appeal the court reversed defendant's conviction upon a finding that the officers were trespassers *ab initio* since they should have obtained a search warrant if they were going to a residence to search for the suspect.

hours or on what days he is present. In still other instances, as, for example, when the suspect has been under continual investigation and surveillance, the very foreseeability of his presence supports the practicality of obtaining a warrant to search for him. It is significant that the suspect's interest in his residence may not be exclusive; third parties—relatives or friends—may have a privacy interest in the premises. For these reasons a judicial determination of probable cause should precede any search for a suspect—even on his own property.

The law concerning searches on a third party's premises is an improvement in that it requires, in addition to an arrest warrant, a probable cause decision as to the suspect's whereabouts. Unfortunately, it calls for a police determination only—a determination which may frequently be inadequate. For obvious reasons an enforcement oriented agency will have difficulty in objectively determining probable cause. Whether the search be of the suspect's premises or the premises of a third party the determination of probable cause must be made by a decision-maker who is "neutral and detached"[63] and "judicial."[64] The precedent is clear. If the search warrant procedure is meaningful for property searches, then it is meaningful also for person searches.[65]

Another problem with many of the cases dealing with person searches is the blurring of the entry issue and the subsequent search issue.[66] The

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[63] Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971).

[64] Shadwick v. Tampa, 407 U.S. 345 (1972) discusses the requirement of a "judicial" officer and cites earlier cases. *Id.* at 348-50. The effect of the decision, however, is to dilute the judicial quality because it allows municipal clerks to determine probable cause and issue arrest warrants. The authorization by the Court appears to be narrow as the clerk's authority extends only to breaches of municipal ordinances.

[65] The classic statement of this policy was made in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

[66] In Warden v. Hayden, 387 U.S. 294, 298 (1967), the Court did consider the search separate from the entry, observing, "We agree . . . that neither the entry without warrant to search for the robber, nor the search for him . . . was invalid." The Court also added, "The permissible scope of the search must, therefore, at the least, be as broad as may

commingling of the two problems produces the reasoning in *Dorman* that "if the entry to make an arrest was lawful, the police acted reasonably in looking behind sofas and in closets to locate the suspect"[67] and in *Morrison* that "the entry is lawful or unlawful at the time it is made, and a subsequent search has the same legal character as the entry which made it possible."[68]

When an intrusion is based upon exigent circumstances the entry and scope of the search are usually supportable by the same considerations of exigency; this may account for the issue blurring. When, however, an entry is justified because of the arguably greater police authority under an arrest warrant, it does not necessarily follow that a broad search of, for example, closets or cabinets is also justified. Although the lawfulness of an entry to arrest *may* validate subsequent search activity, it may just as well not; what is required is an independent appraisal of the scope of a post-entry search.

IV. Exigent Circumstances

In the absence of a search warrant, a search for a person when conducted under exigent circumstances is consistent with the fourth amendment standards of reasonableness. It has been suggested that in addition to the usual exceptions, the grounds which support an arrest are in themselves exigent circumstances,[69] and that the inherent mobility of the person creates an exceptional circumstance.[70] These suggestions require comment.

The argument that the facts which call for an arrest of a suspect make reasonable a warrantless search of a premises for him is based on the premise that inherent in the concept of arrest is a need for immediacy: that an arrest should occur immediately after the crime or immediately after sufficient evidence is obtained which would support an arrest.

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reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape." *Id.* at 299. Justice Stewart has characterized "the question of the scope of the search and seizure once the police are on the premises [as] subsidiary to the basic issue of when intrusion is permissible," and has said "that the difficult inquiry would be when it is that the police can enter upon a person's property to seize his 'person . . . papers, and effects,' without prior judicial approval." Coolidge v. New Hampshire, 403 U.S. 443, 475 (1971).

[67] 435 F.2d 385, 394 (D.C. Cir. 1970).

[68] 262 F.2d 449, 453 n.10 (D.C. Cir. 1958).

[69] United States v. McKinney, 379 F.2d 259, 263 (6th Cir. 1967).

[70] *Id.* *See also* United States v. Hall, 348 F.2d 837, 841 (2d Cir. 1965), in which Judge Friendly stated,

> One reason underlying the distinction [between the warrant requirement in the law of search and seizure and its absence in the law of arrest] may be that a person, save possibly when asleep at home during the night, always has the same potential mobility as do objects which are in a moving vehicle . . . and are thus subject to search and seizure on probable cause without a search warrant.

To what extent immediacy is important to successful arrests is simply unknown.[71] The issue is complex. Immediacy in investigating a crime must be distinguished from immediacy in arresting a criminal. In many instances it is important to get a suspect's description or identity and thus to get to the crime scene and witnesses quickly;[72] but there may be no hurry in getting to the suspect. In other situations there is no need even for prompt investigations. In many assaults, for example, the victim knows well the offender. Further, if the investigating techniques of a police department anticipate the use of detectives to follow up reports of certain crimes, then in those instances, police policy has assigned thoroughness a higher priority than speed.[73]

The nature of the criminal and the crime are also relevant. An offender who is dangerously irrational or one who plans to flee the jurisdiction must be captured immediately; but many criminals, even killers, are not necessarily still dangerous;[74] and many people are aware that flight is apt to attract suspicion to them, even if they do not know that it may be admissible evidence of guilt. There are many crimes which do not inherently call for quick arrest. Examples include white collar crimes, such as embezzlement, fraud, and bribery; highly organized criminal activity, for example, conspiracies involving a complex personnel arrangement and complex goals; and "victimless" crimes such as gambling, prostitution, and drug misuse. On the contrary, often the "delayed arrest"[75] is used—sometimes to further police ends of, for instance, arresting "many later instead of one now,"[76] and sometimes to achieve purposes beyond arrest, such as the acquisition of evidence sufficient to convict.[77] What this analysis suggests is that the risks are neither so great nor so obvious as to elevate arrest qua arrest to the level of an exigency. From a practical standpoint it should be incumbent upon the police to obtain a search warrant or combination type warrant with nearly the same regu-

[71] This is not surprising. Empirical evidence on police practices is still more assumption than fact in many respects. The real facts are needed, however, if the law is to continue to build itself on a factual foundation. Hopefully, the empirical research on police practices that has taken place recently will be read as an encouragement for more and not as an indication that the field has been drained of value.

[72] *See, e.g.*, PRES. COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 96-97 (1967).

[73] Frequently arrests on private premises are made by detectives during the investigative period. *See* LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. LAW BULL. 9, 22 (1972).

[74] It is common knowledge that the recidivism rate for murderers is very low.

[75] *See* W. R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 208-24 (1965).

[76] *Id.* at 222-24.

[77] Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 876 (1963).

larity with which they procure an arrest warrant. Frequently the search of a private premises will be inherent in the situation and may be, in fact, a foreseeable prerequisite to an arrest.[78] As Judge Wright, dissenting in *Dorman*, suggested, "no reason appears why the judge or commissioner cannot put reasonable limits on its [arrest warrant's] execution, at least where police state they intend to enter a home to effectuate the arrest . . . so the time of execution is clearly a consideration that the judge or commissioner can take into account."[79] Limitations can be applied as well to the place of execution. Alternatively, a search warrant itself can be issued. Such a suggestion was included by the Baltimore City Police Commissioner in a General Order issued in response to the complaints set forth in *Lankford v. Gelston*:

> The question has recently arisen as to the precise scope of the authority conferred upon police officers by arrest warrants . . . .
>
> A police officer may make a peaceable or a forcible entry to search any premises for the purpose of arresting a person for whom an arrest warrant has been issued if, but only if, the officer has probable cause to believe the accused person to be on the premises to be searched.
>
> . . . If the officer has any doubts as to the existence of "probable cause," he should immediately seek the issuance of a search warrant, or consult with the office of the State's Atorney . . . before attempting entry upon private premises in search of the accused person.[80]

The argument has also been suggested that the inherent mobility of the person presents grounds for a warrantless search on probable cause. The reasoning is superficially analogous to that given by the Supreme Court for warrantless searches of a vehicle upon probable cause ". . . because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[81] Even assuming a valid analogy between automobile searches and person searches, Supreme Court authority does not "suggest tnat in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."[82] As pointed out in *Coolidge v. New Hampshire*,[83] "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears"[84]—nor are the words "person" or "arrest."

Furthermore, the automobile-person analogy is faulty because it com-

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[78] *See* Morrison v. United States, 262 F.2d 449, 452 (D.C. Cir. 1958).

[79] Dorman v. United States, 435 F.2d 385, 402 n.6 (D.C. Cir. 1970).

[80] 364 F.2d 197, 200-01 n.4 (4th Cir. 1966).

[81] Carroll v. United States, 267 U.S. 132, 153 (1925).

[82] Chambers v. Maroney, 399 U.S. 42, 50 (1970).

[83] Coolidge v. New Hampshire, 403 U.S. 443, (1971).

[84] *Id.* at 461-62.

pares searches of automobiles with searches for persons instead of searches of automobiles with searches of premises for persons. The difference is especially important where the premises to be searched is a person's residence. Decisions of the Supreme Court both before and after *Katz v. United States*[85] have indicated a continuing preference for the sanctity of the home as opposed to vehicles. As the Court has said, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars."[86]

The issue then is whether it is more reasonable to invade the privacy of a home when the object of a search is inherently mobile than when the object is inherently immobile. The Supreme Court has not spoken on this point and the distinction itself is of questionable validity. The risk that property will be destroyed or removed is conceivably as great as, if not greater than, the risk that a suspect will flee. Examples of evidence easily destroyed and evidence easily and secretly removed by persons other than the suspect are abundant and include drugs, gambling slips, and paper records such as receipts and memoranda.[87] When the problem shifts from property to person, destruction is no longer an issue, and the risk of the person disappearing by escaping can be reduced by use of the police stakeout or guard.[88]

The point is that for exigent circumstances in support of a search for the person to be reasonable under the Constitution, they should be reasonable in fact. Fictions, loose analogies, and easy assumptions ought not be sufficient to satisfy the constitutional requirement.[89]

V. CONCLUSION

The cases discussed establish that searches for the person do occur in a variety of contexts, and that the problem for the criminal law system is not frivolous; that current law—whether statutory, administrative or judicial—does not adequately control the practice; and that whatever ju-

[85] Katz v. United States, 389 U.S. 347 (1967). In *Katz*, the Court indicated that the fourth amendment is intended to protect persons not places.

[86] Chambers v. Maroney, 399 U.S. 42, 52 (1970). *See also* Vale v. Louisiana, 399 U.S. 30 (1970), decided the same day as *Chambers*.

[87] The Supreme Court has never held that the fact that property may be destroyed or removed, is sufficient by itself to create an exigency. *See* Vale v. Louisiana, 399 U.S. 30, 34-35 (1970).

[88] Police guarding of the property was one factor relied upon by the Supreme Court in refusing to apply the "automobile exception" to the automobile search in Coolidge v. New Hampshire, 403 U.S. 443, 458-62 (1971).

[89] As Justice Harlan reminded the Court: "Fidelity to [the warrant principle] requires that, where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented." Chambers v. Maroney, 399 U.S. 42, 61 (1970).

dicial innovation there has been to upgrade the law is too timid. Fortunately, the cases also disclose a willingness on the part of some judges to consider or reconsider the problem.

In *Coolidge v. New Hampshire*[90] Justices Stewart and White engaged in a dialogue which suggests that the Supreme Court may yet examine the subject.[91] Even as dictum, a statement of the constitutional status of person searches could be useful in educating police administrators as to their obligations.[92] Beyond dictum, the Court may hold, body exclusion aside, that the exclusionary rule is applicable to evidence obtained incident to a constitutional arrest which was made pursuant, however, to an unconstitutional search for the person. Practically, the little attention that search for the person has received in both police and judicial annals may be the result of the absence of a ready judicial remedy for illegal person searches such as body exclusion.[93] Whether or not judicial exclusionary controls can be fashioned, alternative remedies and protections[94] should be identified and developed by the legal system.[95]

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[90] 403 U.S. 443, 480 (1971).

[91] Parts of this dialogue are quoted in note 21, *supra.*

[92] The impact of any court decision on relevant publics is unclear. The impact of dictum is perhaps more so. Nevertheless, for administrators interested in complying with constitutional requirements, dictum from the Supreme Court can be helpful. *See* response of the Baltimore Police Commissioner and the court's reaction to it in Lankford v. Gelston, 364 F.2d 197, 200-05 (4th Cir. 1966).

[93] The exclusionary remedy for illegally seized evidence has been the track on which fourth amendment issues have reached the Supreme Court in abundance. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968). On the other hand, notwithstanding the absence of an exclusionary rule for illegally seized live bodies, the person search issue has been present in many cases in which courts considered the admissibility of property found incident to searches for persons and arrests. Thus the opportunity for judicial clarification of the law has not been lacking.

[94] These should include effective remedies for innocent persons who have been subjected to warrantless invasions by officers conducting searches for persons under arrest authority. A recent incident made the front page of the New York Times. On April 23, 1973 four federal narcotics agents, on the basis of "tips," made forceful warrantless nighttime entries into the family residences of two Illinois couples—by mistake. N.Y. Times, April 29, 1973 § 1, at 1, col. 8. According to Myles J. Ambrose, Special Assistant Attorney General, the agents had been searching for two fugitives. A suit for damages has been filed. N.Y. Times, May 2, 1973, at 21, col. 1. 42 U.S.C. § 1983 (1970) provides a remedy for unconstitutional abuses committed by state or local police. *See also* Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (applicable to federal police). However, in Rodriguez v. Jones, 473 F.2d 599 (5th Cir. 1973), a suit for damages under § 1983 was unsuccessful in the face of a defense that the officers "reasonably [albeit mistakenly] believed in good faith," Person v. Ray, 386 U.S. 547, 557 (1967), that the suspects sought were on the premises. 473 F.2d at 605. If the standard of reasonableness is the *officer's* reason to believe rather than a prior *judicial* determination of probable cause (absent any exigent circumstances), then even without a search warrant police defenses of reasonableness will prevail and preclude recovery.

[95] Because cases often serve as the initial source of data and because problems often are first presented to and solved by courts does not mean that courts have prime responsibility for fashioning effective and constitutional police practices. On the contrary, the responsibility is administrative.

If there is a pivotal feature in distinguishing the reasonableness of warrantless searches for persons from comparable searches for property it may be the public interest in apprehending criminals. This interest demands that the police have effective means for making arrests; however, given the scope of the exigent circumstances exception to the mandate of a search warrant, a requirement of prior judicial approval of searches for persons in the absence of exceptional circumstances would not appear to impose a major burden upon the police.[96] Particularly in this post-*Chimel*[97] period in which searches incident to arrest are narrowly restricted, searches precedent to arrest, unbound by search warrant requirements and judicial determination of probable cause, become a possible effective means of undercutting these restrictions and the policies behind them, and may lead to police use of timed arrests and broad exploratory searches for persons in order to provide lawful presence and "inadvertent" discovery of evidence.[98] Analysis reveals, however, no convincing reason why search and seizure procedures do not include search for the person within their protections.[99] Absent a search warrant, there is little to validate a person search on the grounds that arrest or inherent mobility establishes exigent circumstances.

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[96] We have no empirical evidence one way or the other on this point. If there are police reasons why the warrant system would not work, police spokesmen should make their views known.

[97] Chimel v. California, 395 U.S. 752 (1969). *Chimel* set forth the existing standards for search incident to a lawful arrest. *But cf.* United States v. Robinson, 94 S. Ct. 467 (1973).

[98] *See* People v. Bock, 6 Cal. 3d 239, 491 P.2d 9, 98 Cal. Rptr. 657 (1971). After arresting several persons on the first floor of a home where a pot party was in progress, the police, incident to the arrest, searched upstairs for additional participants and discovered marijuana in "plain view." Reversing the trial court's dismissal of the information charging the defendant with possession of marijuana, the court held the post-arrest search reasonable and the seizure lawful. *Chimel* was found to be inapplicable since the officer was looking for additional suspects and not contraband; but the court questioned the "propriety of conducting in every case a general exploratory search for 'possible suspects.'" *Id.* at 243, 491 P.2d at 11, 98 Cal. Rptr. at 659. The dissent pointed out, "To permit such searches would totally emasculate *Chimel* and allow the police to search any areas except places like desk drawers which are so small that even a midget could not hide in one." *Id.* at 248, 491 P.2d at 15, 98 Cal. Rptr. at 663. *See also* Guidi v .Superior Court, 14 CRIM. L. REP. 2001 (Calif. Sup. Ct. Sept. 5, 1973) and United States v. Blake, 14 CRIM. L. REP. 2002 (8th Cir. Sept. 12, 1973).

In United States v. Blair, 366 F. Supp. 1036 (S.D.N.Y. 1973), the district court followed the rule that "an officer may enter a dwelling to make a warrantless arrest of a person whom he has probable cause to believe has committed a felony." *Id.* at 1039. The police entered an apartment to arrest a suspect. They searched the premises for him but he was not at home. While searching, however, they found incriminating evidence. They then arrested three persons who entered the apartment. They found a large quantity of hashish in an attache case and a satchel carried by one of the arrestees. The hashish was found to be *not* inadmissible on a motion to suppress.

[99] This is so unless history is accepted as a convincing reason. The person search historically was not included within warrant controls over search practices. *See* the discussion in Barrett, *supra* note 2, at 49.

At the policy level both the history and the current meaning of the fourth amendment support the constitutional value that police searches—of all kinds—to be reasonable must be carefully circumscribed. A failure by courts and the criminal justice system to control and confine police searches for the person is constitutionally impermissible because it encourages the police to search at a continually more general level, thus creating the same kind of infringement produced by the hated general warrants and writs of assistance of pre-constitution days. On balance, the conclusion seems clear: the law and the practice concerning person searches should be made to comply with fourth amendment search warrant requirements.[100]

[100] That persons, not property, were the objects of the unconstitutional search in Almeida-Sanchez v. United States, 93 S. Ct. 2535 (1973), seemed not to be significant to either the majority or the concurring opinion. The dissent's opinion that the search was reasonable similarly did not turn on the fact that persons qua persons were the search object.